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THE UNINTENDED CONSEQUENCE OF TORT REFORM IN MICHIGAN: AN ARGUMENT FOR REINSTATING RETAILER PRODUCT LIABILITY

Ashley L. Thompson*

Tort reform became an important issue during the 1994 Congressional Campaign as part of the Republican Party's "Contract with America." Since then, many federal and state laws have attempted to reduce both liability and recovery in tort actions. In 1996, Michigan passed the Tort Reform Act, encompassing many drastic changes to state tort law. One provision of the Act, § 2947, scaled back liability against non-manufacturing retailers in product liability actions. The Michigan Supreme Court interpreted the exceptions of the law narrowly and the prohibition broadly, essentially barring recovery from retailers. Since 1996, this provision has prevented victims injured by defective products from receiving compensation for their injuries from retailers. Unfortunately, many of the defective products found in the United States originate from manufacturers abroad. If jurisdiction over the manufacturer cannot be established in the United States, then the Michigan victim has no opportunity for recovery. As an example, this Note will discuss the problems associated with establishing jurisdiction to sue a Chinese manufacturer. Many of the recently publicized defective products were manufactured in China, but victims injured by a defective product from China have found it futile to sue the Chinese manufacturer. The Chinese manufacturers therefore remain protected from liability. As a result, a person injured in Michigan by a product manufactured in China is unlikely to recover damages for his or her injury from either the manufacturer or the retailer. This Note will argue that Michigan must reinstate retailer liability in order to discourage the importation of defective products and also to compensate those who are injured when a defective product does make it to market.

I. INTRODUCTION

The first part of this Note will discuss the arguments for and against tort reform and will then begin to track its development at both the federal and state level. Tort reform advocates, and their championing party, the Republicans, have encouraged reform in order to reduce "frivolous" litigation.¹ With litigation costs reduced, reformers argued that insurance premiums would decrease

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1. Saundra Torrey, *Both Sides Tote Up the Votes for Tort Reform Redux*, WASH. POST, Nov. 25, 1996, at F07.

and lead to lower prices for consumer products and health care.² Despite the counterarguments promulgated by Democrats and others opposed to the reforms, many Americans supported the idea, and tort reform became a popular issue. Many states, including Michigan, decided to implement tort reform at the state level in addition to those reforms being proposed at the federal level.³

The next part of this Note will focus on Michigan's state-specific tort reform, including the passage of the Tort Reform Act of 1996 and one of the Act's most radical provisions, § 2947.⁴ Prior to the Tort Reform Act of 1996, Michigan held retailers responsible for manufacturing defects under a theory of implied warranty.⁵ Once § 2947 passed, however, the Michigan courts interpreted the provision narrowly and as a result, the courts abolished essentially all retailer liability in product liability actions.⁶ This part of the Note will discuss the development of § 2947 through the examination of several key cases decided by the Michigan Supreme Court.

The third part of this Note will focus on the unintended consequence of the decision to abolish non-manufacturing retailer liability in Michigan. Recent consumer scares from defective imported products have illustrated the potential defects in the state of the law.⁷ If a victim cannot establish jurisdiction over a foreign manufacturer, § 2947 makes it nearly impossible for a victim to recover for his or her injuries. This Note will illustrate this consequence by using China as an example. China makes it a practical impossibility to serve process on its manufacturers, so consumer-victims injured by these products are unable to sue the

2. Stephen Labaton, *House Panels Begin Work on Torts Law*, N.Y. TIMES, Feb. 23, 1995, at A19 (stating the Republican position that "costs of products would come down as business insurance premiums and legal costs decline").

3. See generally Leah R. Young, *Tort Reform Drive Seen Advancing at State Level*, J. OF COM., Feb. 1, 1989, at 15A ("Twenty-eight states and the District of Columbia will debate changing their liability laws this year, the American Tort Reform Association predicts.").

4. MICH. COMP. LAWS § 600.2947 (2007).

5. Michigan had never adopted the strict liability proposed by the Restatement (Second) of Torts, but only imposed liability through the theory of implied warranty.

6. *Coleman v. Maxwell Shoe Co.*, 475 F. Supp. 2d 685, 691 (E.D. Mich. 2007).

7. See generally Walt Bogdanich, *Wider Sale Seen for Toothpaste Tainted in China*, N.Y. TIMES, June 28, 2007, at A1 ("[T]ainted Chinese toothpaste had entered the United States . . ."); Darrell Hughes, *Is That Toy Safe? Specialty Shops Take Steps to Ease Fears*, DETROIT FREE PRESS, Sept. 4, 2007, at 10A ("Mattel's most recent recall of Chinese-made toys contain[ed] lead-based paint . . ."); Patricia Sullivan, *Criminal Probe Opened in Pet Food Scare; FDA Says Charges Possible; Tainted Pork Confirmed in California*, WASH. POST, Apr. 21, 2007, at A10 ("Five companies received the contaminated Chinese rice protein concentrate."); Xiyun Yang, *Regulators Tell Importer to Recall 450,000 Defective Chinese Tires*, WASH. POST, June 27, 2007, at D02 (stating the recall was required "after the company notified regulators last week that the tires were missing gum strips, a safety feature").

manufacturer of the product,⁸ and under Michigan law, are also unlikely to successfully recover from the retailer.⁹ As a result, Michigan victims are likely left without any possibility for recovery of damages.

The final part of this Note will suggest that retailer liability should once again be imposed in Michigan. Without reform, the strict interpretation of § 2947 encourages retailers to pick the cheapest available product, but cheaper products may not include full provisions for safety, making it more likely that these products will be unsafe for consumers.¹⁰ Instead of the current system, retailers must be given incentives to provide consumers with the safest available products. Along with manufacturers, retailers are better equipped than consumers to assure the procurement of safe products.¹¹ They are also in a better position to absorb the cost of defective products through insurance and other risk-sharing mechanisms.¹² Finally, retailers should recognize a legal, if not a moral, duty to prevent or to remediate the injuries caused when they unleash a defective product on an unknowing and uneducated general public.¹³ In general, the current policy is harmful to the economy and to Michigan consumers, and reform must be encouraged.

8. Jeffrey Gold, *Suing Chinese Firms is Exercise in Futility: Many Companies Tied to Government*, J. GAZETTE (Fort Wayne, Ind.), Feb. 11, 2008, at 1C.

9. *Coleman*, 475 F. Supp. 2d at 691.

10. See Derrick Williams, Note, *Secondhand Jurisprudence in Need of Legislative Repair: The Application of Strict Liability to Commercial Sellers of Used Goods*, 9 TEX. WESLEYAN L. REV. 255, 271 (2003) ("If the increased price of the product reflects the costs associated with the activity, then the natural tendency of consumers to substitute lower-priced products will also result in greater consumption of safer products, thus, a decrease in total accident costs to society. . . . If a manufacturer produces a more dangerous product but is not subject to strict liability, then that manufacturer will not be forced to internalize the accident costs associated with its products, and the price of those products will not increase. As compared to the other, more expensive products that are subject to strict liability, it will be those cheaper, more risky products that will attract customers, and the result will be a misallocation of resources and an increase in accident costs.").

11. Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 726 (1965).

12. LAURIE HOPKINS, INT'L PROGRAMS COORDINATOR, U.S. CONSUMER PROD. SAFETY COMM'N, PRESENTATION TO MANUFACTURERS: CONSUMER PRODUCTS EXPORTED TO THE UNITED STATES: WHO IS RESPONSIBLE FOR SAFETY? (on file with the University of Michigan Journal of Law Reform) [hereinafter U.S. Consumer Prod. Safety Comm'n], available at http://www.cpsc.gov/vnr/asfroot/export/ProductSafety_English_Transcript.html (stating that retailers and manufacturers can take five steps to ensure the safety of their product: be safety conscious; employ standards; and use certification, testing, and market surveillance).

13. Aaron Arnold, Note, *Rethinking Design Defect Law: Should Arizona Adopt the Restatement (Third) of Torts: Products Liability?*, 45 ARIZ. L. REV. 173, 182 (2003).

II. THE HISTORY OF TORT REFORM

A. *The Appeal of Tort Reform*

In order to understand the development of tort reform in Michigan, it is important to understand why tort reform first appealed to voters generally. Tort reform advocates began portraying victims of torts, and the attorneys who represent them, as unscrupulous and unsympathetic, while at the same time inciting fear of the consequences of tort liability.¹⁴ This combination of attacks proved effective and, as will be discussed in the next section, tort reform gained extensive political momentum.

Martin Kotler is an academic who has studied the manner in which tort reform has been publicized. He writes that advocates for tort reform emphasize the fundamental American value of individualism to promote their policy changes.¹⁵ First, they argue that a victim could have protected himself or herself through a contract, through insurance, or through assuming less risk.¹⁶ Thus, other parties should not be held responsible for the failure of an individual consumer to protect himself, or in other words, protecting oneself should be a matter of "personal responsibility."¹⁷ Since con-

14. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 50 ("The discourse of the tort reformers invokes traditional values such as self-reliance, personal responsibility and property rights to castigate the contemporary civil justice system as unfairly redistributive social welfare and destructive of core American values."). The American Tort Reform Association is one of the premier tort reform organizations. Its website states:

Today, America's \$246 billion civil justice system is the most expensive in the industrialized world. Aggressive personal injury lawyers target certain professions, industries, and individual companies as profit centers. They systematically recruit clients who may never have suffered a real illness or injury and use scare tactics, combined with the promise of awards, to bring these people into massive class action suits. They effectively tap the media to rally sentiment for multimillion-dollar punitive damage awards. This leads many companies to settle questionable lawsuits just to stay out of court.

These lawsuits are bad for business; they are also bad for society. They compromise access to affordable health care, punish consumers by raising the cost of goods and services, chill innovation, and undermine the notion of personal responsibility.

American Tort Reform Ass'n, About ATRA, <http://www.atra.org/about/> (last visited May 14, 2009) (on file with the University of Michigan Journal of Law Reform) [hereinafter ATRA, About ATRA].

15. Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779 (2007).

16. *Id.* at 783-94.

17. *Id.* at 794 ("[T]he bringing of a lawsuit may be interpreted as a refusal to accept personal responsibility for the consequences of one's own decisions.").

sumers have protective options available to them, advocates argue that it is not fair to require manufacturers and retailers to compensate a victim who chose not to protect himself or herself before assuming the risk of injury.¹⁸

In addition, Kotler asserts that tort reformers portray the victim-plaintiff as greedy, "simultaneously asking for something to which he or she is not entitled and refusing to accept personal responsibility for one's own misfortune" ¹⁹ An example of Kotler's assertion is illustrated by the writing of Deborah La Fetra, a proponent of tort reform, in her article supporting the tort reform movement.²⁰ She describes a victim's thought process as "any injury, damage or untoward turn of events in a person's life is the fault of another, for which a lawsuit could bring hefty monetary returns."²¹ When attributes of greed and laziness are forced upon victims of defective products, the victims become increasingly less sympathetic and the public becomes less willing to pay for the victim's "greedy" and "lazy" desire for recovery.²²

Finally, tort reform is appealing because the entire tort system has been portrayed as "broken" and a detriment to society.²³ Rather than benefiting Americans, tort reform advocates argue that the system hurts the American economy.²⁴ Advocates posit that ridiculously high rewards for victims and increasingly frivolous lawsuits are creating a culture where businesses, including doctors and other medical professionals, are wary of practicing.²⁵ La Fetra asserts that "many vitally important businesses have simply chosen not to operate in the United States out of fear of litigation."²⁶ She argues that potential liability and its consequences stifle the economy.²⁷ Therefore tort reform, by decreasing liability, decreases the

18. *Id.* at 793-94.

19. *Id.* at 800.

20. Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645, 645 (2003).

21. *Id.*

22. Rustad & Koenig, *supra* note 14, at 51 ("Reform advocates portray victims of defective products as whiners who refuse to take personal responsibility for injuries caused by their own carelessness.")

23. ATRA, About ATRA, *supra* note 14.

24. *Id.*

25. La Fetra, *supra* note 20, at 645, 673.

26. *Id.* at 645; *see also id.* at 649 ("The stifling effect of the tort system is not speculative; examples abound.")

27. *Id.* at 648 ("Businesses are devoting more and more resources that could be used for innovation into defensive measures to protect against the risk of huge verdicts This allocation draws resources away from new product designs and other innovations. But businesses cannot simply reallocate existing resources by gutting research and development. A certain amount of innovation is required to maintain one's competitive position in the market."); *see also* American Tort Reform Ass'n, Fact or Fiction You Be the Judge: ATRA v. ABA,

costs of goods and services, gives incentive to entrepreneurs to create new products, and keeps America competitive on the global market.²⁸ Under this theory, "American society as a whole benefits . . . [from tort reform because] the freedom to innovate and make mistakes allows entrepreneurs to bring ever-better products to market"²⁹

According to the advocates of tort reform, those who engage in frivolous lawsuits in order to win substantial rewards not only get ahead unfairly, they also sacrifice the economic health of our society as a whole.³⁰ Overall, this message appeals to voters and has as a result become increasingly popular with politicians as well.

B. The Response: Arguments Against Tort Reform

When tort reform advocates began pushing their agenda, the opposition initiated a strenuous campaign to defend the current system. They reminded the public that "[c]ommon law tort liability has developed over centuries to provide a coherent and reasonable system for assessing responsibility and liability when individuals are harmed without their consent."³¹ From their perspective, the system deters people from acting carelessly or negligently and promotes safety by encouraging avoidance of the potential cost of liability.³² In other words, tort liability works as a form of regulation³³ "to influence behavior before the harm ever occurs."³⁴ Furthermore,

http://www.atra.org/wrap/files.cgi/7372_factfiction.hun (last visited May 14, 2009) [hereinafter ATRA, Fact or Fiction] ("[L]itigation puts America at a competitive disadvantage internationally.").

28. See La Fetra, *supra* note 20, at 645.

29. *Id.*

30. ATRA, About ATRA, *supra* note 14.

31. Center for Progressive Reform, Tort Reform, <http://www.progressivereform.org/perspectives/tortreform.cfm> (last visited May 14, 2009) [hereinafter Center for Progressive Reform].

32. *Id.* ("The adverse publicity and financial consequences of tort liability can provide powerful incentives for actors to change their behavior, ultimately resulting in far less damage to the environment and to the health and livelihood of human beings. Indeed, it is often said that American regulatory agencies are able to remain smaller and less intrusive than comparable agencies in Europe and other industrialized nations precisely because the United States has an active tort system that complements and backs up agency efforts. This regulatory effect of tort law should hardly be surprising").

33. *Id.* Advocates for tort reform are fundamentally at odds with this use of the court system. The National Association of Manufacturers, a group that supports tort reform, writes on its website that "[l]itigation should not be the vehicle for the imposition of regulatory regimes on industries or companies." The Nat'l Ass'n of Manufacturers, ILRP-02 Legal Policy, 2.05. Tort Reform (on file with the University of Michigan Journal of Law Reform), available at <http://www.nam.org/policypositions/>.

34. Center for Progressive Reform, *supra* note 31.

[n]ot only does tort law provide important safety incentives for the prevention of threats to the environment and human health, it also provides a platform for citizens to reach out and seek public acknowledgment of the problems that harm and threaten them, but that have failed to attract the attention of legislators³⁵

In addition, tort liability compensates the victims of injuries through the recovery of monetary awards for economic damages and non-economic damages. In a judicial system with tort liability, the manufacturer or retailer will often purchase insurance to cover the potential costs of recovery. These insurance costs can then be passed on to consumers through a subtle price increase on all goods. Therefore, those who benefit from the product (i.e., consumers) help pay for the compensation awarded to those who are injured by the product.³⁶ In the unregulated tort system, this is preferable to forcing a few victims to bear the entire price of injury³⁷ if they are deprived of compensation.

The opposition to tort reform also attempted to downplay the fatalistic assertions made by reform advocates. When tort reformers posited that litigation was out of control, the opposition re-analyzed the data³⁸ and found that it "overstat[ed] available information to create a false appearance of a crisis when, in fact, no crisis exists."³⁹ When reform advocates further stated that the cost of liability was deterring business and slowing down the economy,⁴⁰ the opposition again refuted these arguments by pointing to recent

35. *Id.*

36. James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1579-80 (1991) ("The additional social costs represented by the uncompensated victim . . . or by the manufacturer . . . can be reduced by spreading accident losses among a large number of persons by means of insurance. In general, manufacturers are considered better able to obtain insurance than consumers, and are assumed to be able to pass on most, if not all, of the insurance costs to the consumer by raising the prices of products.")

37. Ctrs. For Disease Control & Prevention, Dep't of Health & Human Services, *The Economic Costs of Injuries*, (on file with the University of Michigan Journal of Law Reform) [hereinafter *Economic Costs of Injuries*], available at http://www.cdc.gov/ncipc/factsheets/CostBook/Cost_of_Injury.htm (citing statistics for the cost of injuries).

38. Lawrence Chimerrine & Ross Eisenbrey, Econ. Policy Inst., Briefing Paper 157, *The Frivolous Case for Tort Law Change* (on file with the University of Michigan Journal of Law Reform), available at <http://www.epi.org/publications/entry/bp157/> ("A key proponent of the view that the tort system has large negative effects on the economy is Tillinghast-Towers Perrin, a company whose clients include most of the world's largest insurance companies. Tillinghast (or TTP) has for many years published a report on what it claims to be the costs of the U.S. tort system. The TTP reports are one-sided. . . . [After analyzing the methods and data used by TTP, the authors find that TTP produces] seriously flawed reports").

39. *Id.*

40. *E.g.*, La Fetra, *supra* note 20.

studies showing that the rising cost of insurance premiums was not the result of malpractice claims.⁴¹ Despite these efforts, the advocates for reform succeeded in capturing the interest of voters and tort reform became an important political issue.

C. A Brief History of Recent Tort Reform at the Federal Level

Tort reform officially gained recognition as a national issue during the 1992 and 1994 Presidential and Congressional elections.⁴² In 1994, it became one of several key issues championed by the Republican Party's "Contract with America."⁴³ The Republican Party Platform argued that tort reform would quell "runaway legal fees, multimillion-dollar verdicts against corporations and a court system clogged with frivolous lawsuits."⁴⁴ Republicans urged voters that "consumers [too] would benefit [from tort reform] because the cost of products would come down as business insurance pre-

41. See Katherine Baicker & Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, 8 F. FOR HEALTH ECON. & POL'Y, ART. 4, 21 (2005) (stating that "past and present malpractice payments do not seem to be the driving force behind increases in premiums" and other factors, such as the insurance underwriting cycle and industry competition may be to blame); Todd C. Berg, *Cut Rate: Med-mal Insurer Announces 2008 Rate Cut, MSMS Says it's 'Proof' Reform Works*, 4 MICH. MED. L. REP. 1, 6 (2008) (stating that "one of Michigan's largest writers of medical-malpractice insurance, will have increased its overall Michigan medical-malpractice insurance rates by approximately 51 percent between 1993-2007" despite tort reform beginning in 1986); Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 210 (2005) ("[E]vidence suggests that no crisis involving malpractice claims outcomes occurred. It thus also suggests a weak connection between claims-related costs and short-to-medium-term fluctuations in insurance premiums. . . . [Regarding the spike in insurance premiums,] the more likely explanation is that much of the rise in premiums reflects insurance market dynamics, not litigation dynamics."); Marc A. Rodwin et al., *Malpractice Premiums and Physicians' Income: Perceptions of a Crisis Conflict with Empirical Evidence*, 25 HEALTH AFF. 750, 757 (2006); WEISS RATINGS, INC., THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE (2003) (on file with the University of Michigan Journal of Law Reform), available at <http://www.weissratings.com/MedicalMalpractice.pdf> (stating that insurance premiums for doctors rose higher in states without caps than in states with caps); Press Release, Weiss Ratings, Inc., Medical Malpractice Caps Fail to Prevent Premium Increases (June 3, 2003) (on file with the University of Michigan Journal of Law Reform), available at http://www.weissratings.com/News/Ins_General/20030602pc.htm.

42. Alessandra Stanley, *Selling Voters on Bush, Nemesis of Lawyers*, N.Y. TIMES, Aug. 31, 1992, at A1 ("As family values become a less prominent campaign issue, passed over for lack of popular demand, a battle over legal values may surface in its place."); Benjamin J. Stein, *Tort 'Reform' is a License to Steal*, N.Y. TIMES, July 30, 1995, at E15 ("One of the promises that the Republicans made in their Contract With America was that they would improve the legal system.").

43. Stein, *supra* note 42.

44. Torrey, *supra* note 1.

miums and legal costs decline.”⁴⁵ Republicans declared that consumers would see lower costs in everything from general consumer goods to health care.⁴⁶ The Democrats responded to the Republicans’ charges by reminding voters that tort litigation is rare and has led to significantly safer products for consumers.⁴⁷ Representative John Conyers, Jr., a Democrat from Michigan, told the New York Times that the proposed tort reform legislation was simply a “veritable wish list of changes requested by corporate defendants” rather than a sincere effort at lowering costs.⁴⁸ Much to the Democrats’ dismay, the issue proved popular and voters responded to the allegations made by the Republicans.⁴⁹

The Republicans gained control of the House and Senate after the 1994 election and began to push through the tort reforms they had promised on the campaign trail.⁵⁰ Since the issue was popular among voters, Democrats were hesitant to appear too weak on “frivolous litigation” and instead touted alternative methods for reducing litigation.⁵¹ President Clinton vetoed the most extensive

45. Labaton, *supra* note 2.

46. Dennis Factor, Editorial, *Doctors Need No-Fault Malpractice Insurance*, DALLAS MORNING NEWS, Nov. 6, 1994, at 10J (arguing that tort reform would lower health care costs); Labaton, *supra* note 2.

47. Labaton, *supra* note 2 (“Democrats and consumer groups said the legislation would roll back decades of advances that had led to safer products, and argued that the sponsors of the legislation had grossly exaggerated the problems in courts . . .”).

48. *Id.*

49. Harriet Chiang, *Bush Attacks ‘Crazy Lawsuits’: Presidential Campaign Puts Lawyers on Trial*, SAN FRANCISCO CHRON., Sept. 24, 1992, at A1 (“Quayle’s public scolding of lawyers ‘obviously hit home with the American public,’ said Connor. ‘They’ve discovered that lawyer-bashing wins friends,’ he said.”); Stanley, *supra* note 42 (“Recent public-opinion surveys suggest that Americans viscerally dislike lawyers and feel that society is, in the words of one Bush campaign focus-group participant, ‘sue-happy.’”).

50. Congress enacted the following laws that included elements of tort reform: the General Aviation Revitalization Act of 1994, the Biomaterials Access Assurance Act of 1998, the Year 2000 Information and Readiness Act, the Prison Litigation Reform Act of 1995, and the Teacher Liability Protection Act of 2001. Rustad & Koenig, *supra* note 14, at 71–72; *see also* Biomaterial Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519 (1998); Charitable Medical Care Act of 1996, H.R. 2938, 104th Cong. (1996); *Also in the Nation*, PITTSBURGH POST-GAZETTE, Aug. 14, 1998, at A13 (Clinton signs the Biomaterial Access Assurance Act); *Bill Would Limit Volunteer Liability*, PHILA. INQUIRER, Apr. 20, 1997, at A05 (Republicans introduce Volunteer Liability Act); Adam Bryant, *Aviation Bill Encourages Manufacturers*, N.Y. TIMES, Sept. 4, 1994, at 20 (Congress enacts the General Aviation Revitalization Act).

51. *See generally* Chiang, *supra* note 49 (“Clinton favors mediation and other alternatives at the state level to save time and money. But he opposes Bush’s proposals for limits on punitive damages and a loser-pay-all-the costs rule because he says they will hurt consumers and the middle class.”); R.G. Ratcliffe, *Quayle, Ads Attack Clinton, Say He’s in ‘Pocket’ of Lawyers*, HOUSTON CHRON., Aug. 28, 1992, at A2 (“Clinton campaign aide Max Parker said Clinton wants to reduce the number of lawsuits nationally by adopting alternative dispute resolution systems, curbing the sealing of court settlements and effective product safety regulation.”).

tort reform proposals,⁵² but signed into law several more moderate bills.⁵³

During the 1990s, the American Law Institute (ALI) also published the Restatement (Third) of Torts.⁵⁴ Although not binding, the Restatement is generally considered a reflection on the current state of the law.⁵⁵ The Restatement (Third) of Torts: Product Liability reflected the dramatic changes occurring at the federal level and attempted to implement a much more conservative tort liability program.⁵⁶ Once the Restatement was published, however, the ALI was criticized for suggesting tort reform was more widespread than reality dictated⁵⁷ and few states officially adopted the conservative regime advocated for by the Restatement.⁵⁸ Despite criticism,⁵⁹ given the influence and national presence of the Restatement, its publication remained an indication that tort reform was on the rise.

The partisan nature of the tort reform debate has continued into the new century. President George W. Bush began campaign-

52. Lee Ann Gjertsen, *Brokers on the Alert in D.C. for 1997*, NAT'L UNDERWRITER PROP. & CASUALTY/RISK & BENEFITS MGMT., Dec. 23, 1996, at 6 (President Clinton vetoes a product liability reform bill).

53. See generally *supra* note 50.

54. RESTATEMENT (THIRD) OF TORTS (1998).

55. Aaron D. Twerski, Commentary, *One Size Does Not Fit All: The Third Multi-Track Restatement of Conflict of Laws*, 75 IND. L.J. 667, 670 (2000) (addressing the process of writing a Restatement and stating that "[t]his process of carefully parsing the case law and getting behind the facade of linguistics is the classic role of restatements. In doing so, we were able to discover a remarkable consensus throughout the country . . ."); see also Rustad & Koenig, *supra* note 14, at 92 ("[T]he Restatement project merely updated the law to reflect the 'pace of American products liability litigation.'").

56. Matthew Warren & Cristie Cole, Case Note, *Gipson v. Kasey: The Beginning of a New Analytical Framework in Arizona for Duty Determinations?*, 49 ARIZ. L. REV. 785, 788 (2007) ("The Restatement (Third) of Torts, approved by the American Law Institute, includes several groundbreaking positions regarding duty and the role of foreseeability in negligence cases.").

57. Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, The Third Restatement, and the Reinstatement of Liability Without Fault*, 70 BROOK. L. REV. 889, 935-36 (2005) ("What the Third Restatement did was prove too much. . . . [The Third Restatement] also caused the re-examination of the ALI as an appropriate policy-making entity, leading to questions about whether the ALI is any more qualified to make policy than the courts."); see also Rustad & Koenig, *supra* note 14, at 92 ("It is debatable whether the Restatement (Third) reflects state court developments.").

58. John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 553 (1996) ("[T]here are only three states which have accepted the co-reporters extremely narrow view as set forth in section 2(b).").

59. *Id.* at 502 (addressing some of the most common critiques of the Restatement (Third) of Torts, including "failure to accurately reflect a consensus," using "citations" that did "not stand[] for the proposition stated," and "failing to provide an in depth [sic] analysis of the position taken in jurisdictions which were excluded from the co-reporters' majority.").

ing on the issue when he first ran for governor of Texas,⁶⁰ and during his two terms as president, tort reform remained in the federal spotlight.⁶¹ During the 2008 presidential primaries, Republican candidates continued to use tort reform to garner support.⁶² In contrast, Democrats like John Edwards, a former personal injury attorney,⁶³ continued to fight against these Republican efforts,⁶⁴ making it likely that the issue will remain contentious for years to come.

D. A Brief History of Recent Tort Reform in Michigan

Even before tort reform gained national traction, Michigan was calling into question the necessity of a strict tort liability regime. When the ALI published the Second Restatement of Torts in 1963, it adopted a strict liability regime for torts under § 402A.⁶⁵ Michigan was one of the few states that never adopted § 402A.⁶⁶ Instead, the state held retailers vicariously liable through an implied warranty regime.

60. Richard A. Oppel, Jr. & Glen Justice, *Kerry Gains Campaign Ace, Risking Anti-Lawyer Anger*, N.Y. TIMES, July 7, 2004, at A15 ("President Bush . . . at the urging of his political adviser Karl Rove, has made attacks on trial lawyers a central part of his political strategy ever since his first run for Texas governor a decade ago.").

61. See generally Gretchen Morgenson & Glen Justice, *Taking Care of Business, His Way*, N.Y. TIMES, Feb. 20, 2005, at B1 (President Bush signs Class Action Fairness Act of 2005); Richard A. Oppel, Jr., *Limiting Lawsuits on a National Scale*, N.Y. TIMES, Dec. 29, 2002, § 4, at 6 ("Mr. Bush and Congressional Republicans are poised to back changes in tort law . . .").

62. John Donnelly, *Malpractice Curbs Hailed, Faulted: Texas Law Draws Doctors, Frustrates Some Claimants*, BOSTON GLOBE, Nov. 26, 2007, at A1 ("On the presidential campaign trail, Republican Rudy Giuliani has frequently trumpeted the Texas [tort reform] example, saying it could bring economic benefits and improve healthcare access in other states."); Christi Parsons & Andrew Zajac, *Rudy Runs on 'Results'; Hard-Charging Former New York Mayor is Out to Prove He's More Than Just 'the 9/11 Guy'*, CHI. TRIB., Dec. 18, 2007, § 5, at 1 (stating Giuliani has "12 Commitments to the American People," including tort reform).

63. Donnelly, *supra* note 62 ("Democratic hopeful John Edwards, a former trial lawyer, has said that the changes hurt the victims of medical errors while doing little to reduce the cost of healthcare.").

64. Timothy L. O'Brien & Jonathan D. Glater, *Robin Hoods or Legal Hoods? The Government Takes Aim at a Class-Action Powerhouse*, N.Y. TIMES, July 17, 2005, at B1 ("Republicans, heavily financed by corporate coffers, have sought to rein in the plaintiffs' bar, while Democrats, beneficiaries of hefty contributions from [tort] lawyers . . . have maneuvered in opposition.").

65. Vargo, *supra* note 58, at 507 ("By 1964, this process culminated in the final form of the present rule for strict liability, section 402A, which applies to all products.").

66. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98 n.11.5 (5th ed. Supp. 1984) ("[T]he only remaining jurisdictions that have failed to expressly adopt strict tort liability for defective products appeared to be Delaware, Massachusetts, Michigan, North Carolina, Virginia, and the District of Columbia.").

As tort reform gained prominence, the Michigan legislature began adopting tort reform measures at the state level. In 1985, the Michigan legislature passed a Senate Resolution attributing the cost of insurance premiums to frivolous civil litigation.⁶⁷ Soon after, the legislature passed the Tort Reform Act of 1986,⁶⁸ and later the Medical Malpractice Reform Act of 1993.⁶⁹

In 1996, the combination of a Republican governor, conservative legislature and supportive judiciary⁷⁰ meant that Michigan was able to pass various tort reforms,⁷¹ including its most drastic legislation yet, the Tort Reform Act.⁷² This Act abolished joint and several liability and apparent manufacturer⁷³ liability.⁷⁴ Since Michigan had never adopted strict liability under § 402A, the effect of the Tort Reform Act of 1996, once interpreted by the courts, was also to abolish claims for an implied breach of warranty.

E. Tort Reform in Michigan Prevents Recovery from a Retailer

The product liability provision of the Tort Reform Act of 1996 was codified in Michigan Compiled Laws § 600.2947(6).⁷⁵ Section

67. Berg, *supra* note 41, at 1, 6 (“Michigan’s experiment with medical malpractice was born of a 1985 Senate Resolution decrying ‘a crisis in civil litigation,’ which was causing ‘skyrocketing’ insurance premiums in ‘critical areas’ such as medical malpractice.”).

68. Todd C. Berg, *Different Directions: Medical-malpractice Reform Promised Lower Insurance Rates for Doctors. Yet, as Filings Dropped, Premiums Continued to Rise. So Did Insurer Profits.*, MICH. LAWYERS WKLY, July 16, 2007, at 1 (stating the Tort Reform Act put a cap on non-economic damages in certain areas of law and also required the plaintiff in medical malpractice cases to file an affidavit of merit or risk dismissal of his or her case).

69. Berg, *supra* note 41, at 6.

70. See Stephen J. Choi et al., *Which States Have the Best (and Worst) High Courts?*, 18–22 (Univ. of Chicago John M. Olin Law & Econ. Working Paper Series, Working Paper No. 405, 2008), available at <http://www.law.uchicago.edu/files/405.pdf> (stating that Michigan’s Supreme Court ranks last among the fifty states for partisanship and independence).

71. See 1995 Mich. Legis. Serv. 1994–2003 (West). Governor Engler’s reputation as a tort reformer helped him land a lucrative job following his stint as Governor: he joined the National Association of Manufacturers, a lobbying organization in Washington that represents manufacturers and supports tort reform, as President and Chief Executive Officer. Nat’l Ass’n of Manufacturers, Biography of John Engler, <http://www.nam.org/AboutUs/MemberAndStaffLeadership/MemberAndStaffLeadershipBios/JohnEngler.aspx> (last visited May 14, 2009). The NAM policy position on tort reform is available at <http://www.nam.org/policypositions/> (last visited May 14, 2009).

72. 1995 Mich. Legis. Serv. 1994–2003 (West).

73. The Restatement defines the apparent manufacturer doctrine as “[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.” RESTATEMENT (SECOND) OF TORTS § 400 (1965).

74. 1995 Mich. Legis. Serv. 1994–2003 (West).

75. MICH. COMP. LAWS § 600.2947(6) (2007) (“In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true: (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate

2947 clearly abolished retailer liability, with two exceptions for, in essence, contract claims: retailers would be held liable if they acted in violation of an express warranty or if they breached an implied warranty.⁷⁶ With these exceptions, the Michigan legislature left room for its courts to interpret both “reasonable care” and “express warranty” broadly in order to allow for plaintiffs to recover.

At first, it appeared that the courts would interpret the terms of § 2947 broadly so as to give the legislation a narrow impact on common law concepts of what it means for a retailer to exercise “reasonable care.” This interpretation is illustrated by the decision in *Adams v. Meijer, Inc.* In *Adams*, the plaintiff purchased a deer hunting tree stand for her husband.⁷⁷ When she purchased the box from the retailer, it was already open.⁷⁸ When the plaintiff’s husband later assembled the stand, there were no instructions enclosed in the box.⁷⁹ He still used it, however, and was subsequently injured when the stand collapsed and he fell at least eighteen feet to the ground.⁸⁰ In determining the liability of the retailer, the court held that:

[A] plaintiff seeking to recover from a retailer must establish: (1) that the seller failed to exercise reasonable care relative to the product at issue and (2) that the seller’s conduct proximately caused the plaintiff’s injuries. Additionally, the statute provides that if a plaintiff can establish a breach of any implied warranty, that will suffice for purposes of showing that the seller failed to “exercise reasonable care” as regards the product.⁸¹

Although the defendants were granted summary judgment, this court’s interpretation of § 2947 allowed for plaintiffs to recover from non-negligent retailers, as long as a breach of an implied, as well as express, warranty could be shown.⁸²

In 2002, however, the Eastern District Court of Michigan ignored the broad interpretation of § 2947 in *Adams* when deciding

cause of the person’s injuries. (b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person’s harm.”).

76. *Id.*

77. *Adams v. Meijer, Inc.*, No. 224213, 2001 Mich. App. LEXIS 298, at *1 (Mich. Ct. App. Dec. 18, 2001).

78. *Id.*

79. *Id.* at *2–3.

80. *Id.* at *4.

81. *Id.* at *8.

82. *Id.* at *8–9.

Mills v. Curioni.⁸³ The plaintiff in *Mills* was an employee of a packaging company.⁸⁴ His “right hand was crushed when the work glove he was wearing got caught in the feeder roller of the [Flexo-Folder-Gluer] machine.”⁸⁵ In tort, the plaintiff filed a complaint against both the manufacturer and the retailer of the machine alleging negligence, defective design and manufacture of the machine, and failure to warn.⁸⁶ In making its decision, the court first looked at “the legislative history of Section 2947” which “reveal[ed] the Legislature’s intent [was] to limit the liability of sellers only to those cases where their independent negligence is shown.”⁸⁷ The court granted summary judgment to the defendant retailer and stated that “a seller’s duty under Section 2947 is based on whether it knew or should have known of the alleged danger”⁸⁸ and limited to cases where it was actively negligent because it “should have recognized” the danger. Contrary to the *Adams* decision, the court in *Mills* left no room for retailer liability.

Following the *Mills* decision, Michigan appellate courts lacked a consensus on how to interpret § 2947. Most courts chose to apply a strict interpretation from *Mills*⁸⁹ rather than the more plaintiff-friendly analysis used in *Adams*.⁹⁰ It wasn’t until 2007, however, that the Michigan Supreme Court finally addressed the issue. When it did, it chose the *Mills* interpretation.⁹¹

The Michigan Supreme Court followed *Mills* in *Coleman v. Maxwell Shoe Co., Inc.* In *Coleman*, the plaintiff purchased a pair of shoes from JC Penney.⁹² Two days later, the left strap on the shoe broke and she fell down a set of stairs, suffering injuries.⁹³ She brought

83. *Mills v. Curioni, Inc.*, 238 F. Supp. 2d 876 (E.D. Mich. 2002).

84. *Id.* at 879.

85. *Id.*

86. *Id.* at 881; failure to warn is defined as: “where it is alleged that a person was injured by reason of the defendant’s failure to warn adequately of a product’s dangerousness.” David Polin, *Failure to Warn as Proximate Cause of Injury*, 8 AM. JUR. 3D *Proof of Facts* 547, § 1 (2008).

87. *Mills*, 238 F. Supp. 2d at 886.

88. *Id.* at 887.

89. See generally *Hastings Mut. Ins. v. Gen. Motors Corp.*, No. 252427, slip op. at 3 (Mich. Ct. App. Mar. 29, 2005) (“[N]o action based merely on a manufacturing defect may lie against a non-manufacturing seller.”).

90. See generally *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 737 (6th Cir. 2000) (“Because the existence of a defect is generally determined by the negligent conduct of the manufacturer, a retailer may be held liable for breaching its implied warranty of merchantability by selling a defective product, even if the retailer’s conduct is wholly free from negligence.”).

91. *Coleman v. Maxwell Shoe Co.*, 475 F. Supp. 2d 685, 689 (E.D. Mich. 2007).

92. *Id.* at 686.

93. *Id.*

suit against the manufacturer and the retailer.⁹⁴ Since the shoe “appeared” to be in good condition, the Supreme Court needed to determine whether § 2947 required the plaintiff to prove “fault on the part of the seller” in order to recover from the retailer.⁹⁵ The court determined that a demonstration of retailer fault was required, and in doing so, explicitly accepted the *Mills*’ court’s interpretation of § 2947 over the *Adams* court’s more liberal reading.⁹⁶

With this decision, the Michigan Supreme Court effectively abolished non-manufacturing seller responsibility for defects caused by the manufacturer, despite the language in § 2947 retaining a breach of implied warranty as a cause of action. The court adopted the language from the *Mills* decision to the effect that, “it was not enough for the plaintiff to claim that the product was sold in a defective state, and the defect caused his injury. In order to recover against the non-manufacturing seller, the plaintiff was required to show independent negligence on the part of the seller.”⁹⁷ The court claimed that § 2947 “should be read to require a plaintiff to prove that the seller knew or had reason to know of a products [sic] defect.”⁹⁸ The court quoted an article from the Michigan Bar Journal on Michigan product liability and affirmed that “[t]he fact finder’s task under the new law should result in a zero assessment of fault to the nonmanufacturing seller, whose involvement in the product may have been no more than to place the product on its shelf.”⁹⁹

The court had interpreted § 2947’s exceptions narrowly, and Michigan would now effectively shield retailers from product liability actions. With this decision, the tort-reformers, guided by the Republicans, succeeded in revamping Michigan’s products liability law as part of their tort reform agenda. Subsequent decisions continued to carve away at retailer liability.¹⁰⁰

Tort-reformers want to see these carve-outs because, in essence, non-manufacturing sellers do not produce the defects for which

94. *Id.*

95. *Id.* at 688.

96. *Id.* at 689.

97. *Id.*

98. *Id.* (quoting *Mills v. Curioni, Inc.*, 238 F. Supp. 2d 876, 886 (E.D. Mich. 2002)).

99. *Id.* at 691 (quoting Rosemary G. Schikora, *No “Apparent Manufacturer” Liability in Michigan*, 75 MICH. BAR. J. 246, 248 (1996)).

100. See generally *Jenish v. Monarch Velo LLC*, No. 05–CV–73648, 2007 WL 1364789, at *3 (E.D. Mich. May 9, 2007) (dismissing plaintiff’s claim for liability under § 2947).

they are held responsible.¹⁰¹ A retailer sells the product, but does not manufacture it, and therefore is unlikely to have created the defect itself. Negligence liability against a non-manufacturing seller creates a duty for the seller to investigate the competence of his manufacturer, even though the seller may not be familiar with the product or how it is produced. Under this theory, negligence liability, and strict liability especially, is extremely inefficient for retailers. Tort reform advocates believe that instead, liability should be placed only on the party who produces the defective product because it has the knowledge and resources to prevent and fix such defects.¹⁰²

In addition, these changes were implemented so that insurance companies could lower the costs of insurance premiums, allowing the retailer to sell the product at a more affordable price and save consumers money.¹⁰³ Although the provision was expected to make recovery more difficult for plaintiffs injured by defective products, the gains achieved were projected to outweigh the losses. Unfortunately, however, § 2947 also created a dire consequence for potential victims: without compensation from retailers, the new provision would now prevent many victims from recovering for injuries caused by a defective product.

III. UNKNOWN IMPACT: THE UNINTENDED CONSEQUENCE OF ELIMINATING NON-MANUFACTURING SELLER LIABILITY IN PRODUCTS LIABILITY ACTIONS

A. Americans Increasingly Import Defective Products

Products sold in America are increasingly manufactured abroad.¹⁰⁴ Many of the inexpensive products we consume remain profitable because the product, or at least part of it, can be manufactured or assembled abroad where costs are lower.¹⁰⁵ This

101. Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1035 (2003) (“[O]ne who is in the distributive chain but did not create the defect should not be liable for that defect . . .”).

102. *Id.*

103. Labaton, *supra* note 2.

104. See, e.g., CONSUMER GOODS INDUS., U.S. DEP'T OF COM., INDUSTRY OUTLOOK: DOLLS, TOYS, GAMES, AND CHILDREN'S VEHICLES 1 (2006), available at http://www.ita.doc.gov/td/ocg/outlook06_toys.pdf (stating that the “large-scale production [of toys] has shifted abroad”); Louis Uchitelle, *As Factories Move Abroad, So Does U.S. Power*, N.Y. TIMES, Aug. 17, 2003, at BU4 (“More than half of the manufactured goods that Americans buy are made abroad, up from 31 percent in 1987.”).

105. Matt Bai, *The New Boss*, N.Y. TIMES, Jan. 30, 2005, at E38; Louis Uchitelle, *Spread of U.S. Plants Abroad is Slowing Exports*, N.Y. TIMES, Mar. 26, 1989, at 1; Venture Outsource,

increase in consumption of products from abroad has, inevitably, led Americans to rely more on foreign manufacturers to ensure that the product is safe.

Recently, we have seen an onslaught of imported defective products from China. Since April 2007, there have been massive recalls and media cover of tainted products such as pet food,¹⁰⁶ fish,¹⁰⁷ tires,¹⁰⁸ toothpaste,¹⁰⁹ children's toys,¹¹⁰ and Heparin (a prescription blood-thinner).¹¹¹ Unfortunately, not one of the defects discovered in the past year were visible to the average consumer. Practically, this means that when these products were placed on the market, consumers were deprived the opportunity to assess their risk for injury before making the decision to purchase them.

B. The Dangerous Relationship Between Defective Products and Michigan's Product Liability Law

In Michigan, because there is effectively no retailer liability, an injured consumer must be able to sue the foreign manufacturer in order to receive compensation for the injury. In some cases, a Michigan resident may be able to recover from a manufacturer based on the manufacturer's relationship to Michigan or the status of the law between the U.S. and the foreign state where the producer resides.¹¹² There are, however, situations where it will prove a

Global Hourly Manufacturing Labor Rate Trend Comparison (on file with the University of Michigan Journal of Law Reform), *available at* <http://www.ventureoutsources.com/contract-manufacturing/trends-observations/2008/global-hourly-manufacturing-labor-rate-trend-comparison> (comparing labor costs across the world and showing that the United States, Europe and Canada have the highest hourly manufacturing labor costs).

106. Sullivan, *supra* note 7.

107. *Recall is Issued for Frozen Fish*, N.Y. TIMES, May 25, 2007, at A14.

108. Yang, *supra* note 7.

109. Bogdanich, *supra* note 7.

110. Hughes, *supra* note 7; Eric Lipton et al., *Admitting Error, Toys 'R' Us Stops Selling Lead-Tainted Bibs*, N.Y. TIMES, Aug. 18, 2007, at C1; Eric Lipton & Louise Story, *Bid to Root Out Lead Trinkets Falters in U.S.*, N.Y. TIMES, Aug. 6, 2007, at A1.

111. Gardiner Harris, *FDA Identifies Tainted Heparin in 11 Countries*, N.Y. TIMES, Apr. 22, 2008, at A1.

112. In some cases, Michigan residents may be able to establish jurisdiction to sue retailers in other states, based on the relationship of the retailer to the third state. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112–13 (1987); *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 763–64 (Ill. 1961). If the Michigan resident does establish jurisdiction, however, the third state court will likely apply Michigan law if the accident occurred in Michigan. *See Alabama G.S.R. Co. v. Carroll*, 11 So. 803, 805–06 (Ala. 1892). Most conflict of law rules require that the law of the site of injury be applied, and therefore a Michigan resident, injured in Michigan, but suing in a third state, will still be subject to Michigan product liability law. In a few cases, the third state may find public policy reasons, such as a strong ethic to compensate injured consumers, as a reason to apply their own product liability law. *See Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918). This

practical impossibility for a Michigan court to obtain jurisdiction over a foreign manufacturer.¹¹³ An example of the effects of an American citizen essentially being unable to establish jurisdiction can be seen with Chinese manufacturers; this is particularly alarming because China is the country from which over 80 percent of our children's toys are currently imported.¹¹⁴

C. China Refuses to Impose Liability on its Manufacturers for the Defective Products Sold to the United States

China signed the Hague Conventions on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters.¹¹⁵ The purpose of this treaty was to codify procedures for international service of process.¹¹⁶ The treaty provides for "service of process by a Central Authority (usually the Ministry of Justice) in the Convention countries."¹¹⁷ The treaty then requires the Central Authority to distribute the service to the proper party.¹¹⁸ By signing this treaty, China ostensibly guaranteed that American consumers would be able to reach its manufacturers in order to establish jurisdiction over them in the United States.¹¹⁹

Unfortunately for Americans, however, this treaty is of little benefit to American consumers injured by a defective product. Since China maintains a high level of secrecy with regard to its

situation, however, is unpredictable and unlikely. It would therefore be irresponsible to make public policy determinations based on the small likelihood that Michigan residents could recover from retailers in a third state, especially where the consumer purchased, used, and/or was injured by the product in Michigan.

113. See Mark P. Chalos, *Successfully Suing Foreign Manufacturers*, TRIAL, Nov. 2008, at 32, 33-35 (providing an overview of the difficulties of establishing jurisdiction over a foreign manufacturer).

114. BarackObama.com, Protecting American Families from Harmful Lead-Based Products (on file with the University of Michigan Journal of Law Reform), [hereinafter BarackObama.com], available at http://obama.3cdn.net/c63f8c9f9add2832ac_eboimv54x.pdf ("Over 80 percent of toys in the U.S. now come from China . . .").

115. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, CHINA JUDICIAL ASSISTANCE (on file with the University of Michigan Journal of Law Reform) [hereinafter CHINA JUDICIAL ASSISTANCE], available at http://travel.state.gov/law/info/judicial/judicial_694.html; Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Convention].

116. See Hague Convention, *supra* note 115.

117. Process Forwarding Int'l, Hague Service Convention, <http://www.hagueservice.net/hsc.html> (last visited May 14, 2009). Requests originating in the United States must be submitted on a form USM-94, available at the office of any United States Marshal. *Id.*

118. See Hague Convention, *supra* note 115.

119. See CHINA JUDICIAL ASSISTANCE, *supra* note 115.

government procedures and bureaucracies, it is difficult to understand exactly why, or at what point in the legal process, suing a Chinese manufacturer often fails. In order to better understand where the Hague Convention process fails, I have spoken with a Michigan plaintiff's attorney who attempted to serve process on Chinese manufacturers.¹²⁰ He helped me to understand some of the difficulties associated with the process.

First, compliance with the Hague Convention's terms relating to translation and service are prohibitively expensive, and practitioners note that China appears to do everything within its power to evade its responsibility under the treaty.¹²¹ When the Chinese government receives service of process through its Chinese Central Authority, it seems that the service rarely, if ever, reaches the manufacturer.¹²² Jeffrey Gold, a journalist researching an article on the futility of suing Chinese companies, found several reasons for the Chinese government's failure to abide by the Hague Conventions. Since the country is still officially Communist, many of the manufacturers are owned, at least partially, by the Chinese government and push for immunity based on their relationship with the State.¹²³ Gold also cites other experts who have claimed that the Chinese government uses failure of service of process to "retaliate" against the U.S. for treatment its government regards as unfair.¹²⁴ Regardless of the reason given, although China officially asserts that it is a party to the Hague Convention, practically it appears to consistently thwart the establishment of jurisdiction over its

120. See Daniel P. O'Neil Aff. (March 10, 2009) (on file with the University of Michigan Law Reform).

121. There is very little written about China's compliance with the Hague Convention. An attorney who attempted to serve process on Chinese manufacturers described the difficulties he encountered. See *id.* He specifically noted the problems associated with China's compliance with the Hague Convention, stating:

China has specifically objected to provisions of the Convention allowing direct service by mail or judicial officials leaving no reliable, independent method to obtain service. Instead the process required by the PRC involves sending a request to the Chinese Ministry of Justice which will then issue instructions on how service can be achieved.

Id. at ¶ 7.

122. See *id.*

123. Gold, *supra* note 8 ("Current obstacles arise because the targets of lawsuits are often companies that are partly owned by the Chinese government or army, or are allied with provincial governors . . . their clout can outweigh efforts by the trade ministry to adhere to international agreements . . .").

124. *Id.* ("[T]he Chinese government sometimes obstructs litigation to retaliate when it believes the U.S. or the European Union is 'poking it with a stick.'").

manufacturers, effectively preventing American consumers from recovering from its manufacturers in product liability claims.¹²⁵

If a consumer does try to sue a foreign manufacturer, he or she must hire a plaintiff's attorney who will most likely work on the basis of a contingency fee.¹²⁶ Under a contingency fee agreement, the plaintiff's attorney must then have the capital required to cover the costs of translation and follow-up with the Chinese government until the case is closed. This is prohibitively expensive when there is little guarantee for success and a recovery of costs, meaning that most plaintiff's attorneys will be unable to take on such a case.¹²⁷

The legislative history of Michigan's tort reform indicates that the goal of the reform was to reduce the number of frivolous lawsuits, reduce the consequences of large recoveries and stop non-manufacturing sellers from being held responsible for defects they did not create.¹²⁸ The Legislature did not intend to prevent Michigan victims from recovery. Unfortunately, the failure of the Legislature to foresee the problems associated with foreign manufacturing and product liability created a harsh and unintended consequence for victims.¹²⁹

125. See *id.* ("Experts in International law say they know of no case in which Americans collected any money from a verdict or court order against a Chinese company, although some have been paid through settlements.").

126. BLACK'S LAW DICTIONARY 338 (8th ed. 2004) defines a contingent fee as "[a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. Contingent fees are usu[ally] calculated as a percentage of the client's net recovery" An article in an American Bar Association publication states that a contingency fee is "[f]requently used in personal injury and collection matters It is particularly useful for the lawyer skilled at analyzing cases and accepting those with a high likelihood of success." Edward Poll, *Flat Fees and Contingency Fees—Do They "Fix" Hourly Rates?*, LAW PRACTICE TODAY, June 2007, (on file with the University of Michigan Journal of Law Reform, available at <http://www.abanet.org/lpm/lpt/articles/fin06071.shtml>).

127. Center for Progressive Reform, *supra* note 31 ("Plaintiff's lawyers do frequently take cases on a contingency fee basis, which helps to increase access to the courts among poor plaintiffs, but the financial risk inherent in that approach ensures that lawyers undertake a careful screening of cases to pursue only claims that are likely to succeed on the merits.").

128. This is generally the justification for abolishing retailer liability. See, e.g., Sachs, *supra* note 101, at 1036–37.

129. Sachs, a proponent of tort reform, concedes this point in his article. He writes,

The thesis of this Article, however, is that one who is in the distributive chain but did not create the defect should not be liable for that defect, nor be required to incur substantial legal fees and other expenses as a party to a lawsuit, *as long as the creator of the defect or the creator's insurer is available to satisfy a judgment.*

Id. at 1035 (emphasis added). He continues:

Seller liability is justified where the plaintiff's damages are caused by a product defect and the seller's presence in the case is necessary to permit the plaintiff to recover for those damages. Since distributors, retailers, and other sellers enter the chain of dis-

IV. SUGGESTION FOR REFORM: REINSTATE RETAILER/SELLER LIABILITY IN MICHIGAN

Historically, “strict liability is the public response that is to be expected whenever the society of a given time and place must deal with specific perils which it has come to recognize as serious threats to its welfare.”¹³⁰ As the past year has illustrated, importing defective products has become such a threat to our society’s welfare.¹³¹ The federal government may eventually tackle the concerns associated with this issue,¹³² but in the meantime, Michigan must change its current product liability scheme in order to offer more protection to its citizens. Pragmatic public policy concerns illustrate the need for Michigan to repeal (or re-interpret) the current law, § 600.2947(6), and reinstate non-manufacturer retailer liability in this state.

A. Lack of Retailer Liability Imposes Taxpayer Costs

Imposing liability on retailers will also save money for the government and taxpayers. Without liability, “if the law d[oes] not secure payment for the costs to the victim, those costs might

tribution with the aim of making a profit from their involvement in the distribution process, they should not be heard to complain if they are held responsible for defects in the products they sell when the plaintiff has no means of recovery from the manufacturer.

Id. at 1036. Sachs’ conclusion is that the seller should be released from liability where the manufacturer is “identified, is subject to jurisdiction, can be served with process, and is able . . . fully to satisfy a judgment.” *Id.* at 1048.

130. Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 26 (1970–71).

131. See, e.g., Bogandich, *supra* note 7; Hughes, *supra* note 7; Yang *supra* note 7.

132. In 2007, President Bush established the Interagency Working Group on Import Safety. You can see the Agency’s work at the website www.importsafety.gov (last visited May 14, 2009). Senator Charles Schumer, a Democrat from New York, has been a leader in calling for consumer protection. He was quoted as saying, “There is no question that too many Chinese manufacturers and food producers put the bottom line ahead of safety. . . . We need stricter standards, more thorough inspections, and harsher penalties for Chinese companies and American shippers that turn a blind eye to safety.” James Bacchus, Commentary, *Tainted Imports from China: WTO Obligations Still Apply*, MIAMI DAILY BUS. REV., Sept. 17, 2007, at A5. Schumer has also “called for the creation of an import czar who would have authority over the inspection of goods imported to the United States.” Richard Clough, *Toy Makers Brace for Backlash From Mattel’s Disaster*, L.A. BUS. J., Aug. 20, 2007, at 5. President Barack Obama has also encouraged more protection against imported defective products. BarackObama.com, *supra* note 114 (“Obama will build on his long-standing commitment to removing lead from children’s products and homes to ensure that all American children are given the best opportunity to succeed in the future and he will push China and other exporters to enforce product health and safety standards.”).

ultimately require public financing.”¹³³ This is the current situation in Michigan. If a victim survives an injury from a defective product, but is severely injured, he or she may be unable to work or may be forced to take a lower-paying job because of decreased mobility, pain, or other consequences of the injury.¹³⁴ In the case of a child, the economic consequences are more severe due to a lifetime of the same consequences.¹³⁵ If the victim has no other option for compensation, he or she is forced to turn to the State. This means the State could be required to expend substantial resources to cover the victim’s medical treatment, and if the injury is serious enough, welfare and insurance for the rest of the victim’s life.¹³⁶ In sum, in a number of situations the State and taxpayers could end up paying for the consequences of a defective product. If the state allowed for the imposition of liability on retailers, such expenditures could be avoided.

*B. The Theory of Enterprise Liability Requires the
Internalization of Accident Costs*

Instead of placing these costs on the State, the expenses associated with an injury should be incorporated into the cost of the product based upon its likelihood of causing injury. In other words, the riskier the product, the more expensive its purchase price should be.¹³⁷ The cost of injury is then placed on those parties who benefited from the sale of the defective product by either pur-

133. Irma S. Russell, *The Logic of Legal Remedies and the Relative Weight of Norms: Assessing the Public Interest in the Tort Reform Debate*, 39 AKRON L. REV. 1053, 1064 (2006).

134. Economic Costs of Injuries, *supra* note 37 (“For many people, the injury causes temporary pain and inconvenience; for others, the injury leads to suffering, disability, chronic pain, and a profound change in life circumstances, including substantial financial consequences. The economic costs of injuries include the costs associated with medical treatment as well as lost productivity costs, including wages and accompanying fringe benefits and the ability to perform one’s normal household responsibilities.”).

135. Ctrs. for Disease Control & Prevention, Dep’t of Health & Human Services, *The Economic Cost of Injuries to Children and Adolescents* (on file with the University of Michigan Journal of Law Reform) [hereinafter *Economic Costs of Injuries to Children and Adolescents*], available at http://www.cdc.gov/ncipc/factsheets/CostBook/Cost_of_Injury-Children.htm (“A childhood injury-related death deprives the world of the child’s lifetime of potential contributions, therefore, productivity losses account for 77% of the total lifetime costs of injuries for persons aged 0–4 years who were injured in 2000.”) (citing ERIC A. FINKELSTEIN ET AL., *INCIDENCE AND ECONOMIC BURDEN OF INJURIES IN THE UNITED STATES* (2006)).

136. *See id.*

137. *See* Henderson, *supra* note 36, at 1576–77.

chasing it or profiting from its sale.¹³⁸ This is the theory of “enterprise liability.” This doctrine “forces manufacturers to internalize the accident costs related to their defective products as a cost of doing business, similar to the manner in which manufacturers must absorb other production costs, including materials, labor, and capital.”¹³⁹

In a system without liability, buying a “cheaper” product at the outset is illusory because the cost of potential injury has not been included in the price. Retailers have not been forced to internalize these safety costs into the price of a product, so the costs will fall heavily on those unlucky consumers who are injured by the defective product.¹⁴⁰ The majority of the population benefits from the lower price, while the burden is shouldered by both the few who are injured as well as the State of Michigan, if the State is required to support the injured.

By holding retailers liable, costs can be spread to all consumers who purchase the product.¹⁴¹ “Liability causes the financial burdens of product-related accidents to be included in the prices of potentially harmful products, thereby shifting those burdens to those who use, consume, and thus directly benefit from, the products in question.”¹⁴² As Justice Roger Traynor said in *Escola*, “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”¹⁴³ Although Justice Traynor explicitly mentions manufacturers, the same logic can be applied to retailers: the cost imposed on the retailer can be shared among all consumers.¹⁴⁴ Those who are unlucky enough to be a victim of a

138. Williams, *supra* note 10, at 270 (“Because the manufacturer or that ‘enterprise’ benefits from the activity in the form of profits, it is the enterprise, and not the injured consumer, who should bear the costs associated with the products.”).

139. *Id.*

140. Economic Costs of Injury, *supra* note 37 (discussing the myriad costs of injuries for a victim).

141. Don Lee & Abigail Goldman, *Safer Chinese Products Will Come at a Cost*, L.A. TIMES, Sept. 9, 2007, at A1 (“Now, retailers that had largely dismissed Chinese suppliers’ complaints about the soaring cost of wages, energy and raw materials are preparing to pay manufacturers more to ensure better quality. By doing so, they hope to prevent recalls that hurt their bottom lines and reputations. But those added costs—on a host of items that include toys and frozen fish—mean either lower profits for retailers or higher prices for consumers.”).

142. Henderson, *supra* note 36, at 1577.

143. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

144. See Henderson, *supra* note 36, at 1579–80 (“The additional social costs represented by the uncompensated victim . . . or by the manufacturer . . . can be reduced by spreading accident losses among a large number of persons by means of insurance. In general, manufacturers are considered better able to obtain insurance than consumers, and are assumed to be able to pass on most, if not all, of the insurance costs to the consumer by raising the prices of products.”).

dangerous or deadly defective product should be covered by those who benefit, the consumers and the retailer who sells it, and not by the taxpayers and the State.¹⁴⁵ Liability will allow "the price of products or activities [to] more nearly . . . reflect their costs."¹⁴⁶

The consequence of reduced retailer liability is that consumers in Michigan will end up paying more than consumers from other states for two reasons. First, I have found no evidence to support the claim that Michigan retailers get a discount on their insurance protection. Since no other state has reduced retailer liability as dramatically as Michigan, companies must still recoup insurance costs, and therefore the prices charged in other states must also be charged in Michigan. Second, the State of Michigan must expend more in welfare in order to support those victims who have been injured by defective products and are unable to recover from the retailer or manufacturer. As a result, the State has fewer resources to allocate towards other necessary government functions. Compared to consumers in other states, Michigan's consumers are disadvantaged from two sides.

Advocates for Michigan retailers will counter that imposing non-manufacturing retailer liability would reduce their company's profits and increase their costs.¹⁴⁷ This would result in the failure of companies and thereby increase unemployment rates when former employees are left jobless.¹⁴⁸ The truth, however, is that most states continue to impose liability on non-manufacturing retailers,¹⁴⁹ and since retailers in those states have remained in business, we can assume that they have continued to operate successfully and profitably. It is therefore possible to maintain both retailer liability and a healthy business environment. As a result, Michigan has the unenviable position of barring compensation for some victims, without benefiting from prices lower than those set in states where liability continues to impose higher costs on the retailer.¹⁵⁰

145. See *id.*

146. Calabresi, *supra* note 11, at 722.

147. This is a main argument advanced by advocates of tort reform. See, e.g., La Fetra, *supra* note 20, at 648 ("Businesses are devoting more and more resources that could be used for innovation into defensive measures to protect against the risk of huge verdicts.").

148. Russell, *supra* note 133, at 1063 ("When large companies fail, the people they employ may be without work.").

149. See, e.g., ALA. CODE § 7-2-719 (1975); GA. CODE ANN. § 109A-2-314 (1962); WASH. REV. CODE ANN. § 62A.2-315 (West 2003); WASH. REV. CODE ANN. § 62A.2-715 (West 2003).

150. For example, tort reform has not reduced the price of insurance premiums in Michigan. See, e.g., Berg, *supra* note 68.

C. Imposing Liability Will Support the American Economy

Re-imposing retailer liability would also be beneficial for the American economy. American manufacturers who sell products in the United States are required to spend extra on safety¹⁵¹ because they know that they will be held liable for a defective product under state, including Michigan, law.¹⁵² Chinese manufacturers, however, can disregard safety costs because their government has protected them from liability¹⁵³ and, therefore, they can lower their prices more easily.¹⁵⁴ This exacerbates the price disparity between products from American and foreign-based manufacturers.¹⁵⁵

Holding retailers liable will force them to put pressure on foreign manufacturers to improve the safety of their products.¹⁵⁶ If manufacturers produce safer products, this will raise costs and, by extension, begin to level the production costs between products manufactured abroad and those manufactured here.¹⁵⁷ If all manufacturers are required to produce safer products, the disparity between costs to produce a product in the United States and to produce a product abroad is reduced.¹⁵⁸ Furthermore, based on their years of experience, American manufacturing companies should be more proficient at producing safer products than their counterparts abroad.¹⁵⁹ At a time when Americans are concerned about maintaining American jobs, we should do everything we can to level the playing field for American manufacturers. This is especially true in Michigan, a state that has been devastated by the most

151. See ATRA, *Fact or Fiction*, *supra* note 27 ("Most American-made products are sold in the United States; some are exported. For that reason, the cost of products made in the U.S. must factor in the United States system of litigation, which is considerably more expensive than systems in other parts of the world.").

152. MICH. COMP. LAWS § 600.2947 (2007).

153. Gold, *supra* note 8 ("The flood of Chinese imports has triggered a growing number of lawsuits, but individuals and companies often find it impossible to win damages or other legal redress . . .").

154. Williams, *supra* note 10, at 271. ("If a manufacturer produces a more dangerous product but is not subject to strict liability, then that manufacturer will not be forced to internalize the accident costs associated with its products, and the price of those products will not increase.").

155. See Peter S. Goodman, *When Foreigners Buy the Factory: 2 Towns, Opposite Paths*, N.Y. TIMES, Apr. 7, 2008, at A1 (quoting Michigan Governor Jennifer Granholm as stating that manufacturers in Michigan told her that "[t]here is nothing you can do to compensate for the fact that we are able to pay \$1.57 an hour in Mexico").

156. See Lee & Goldman, *supra* note 141.

157. *Id.*

158. Williams, *supra* note 10, at 271.

159. American companies were first held liable through two early product liability cases. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944).

recent downturn in the economy.¹⁶⁰ One way we can do this is by requiring that all products, whether produced at home or abroad, be held to the similar standards of liability.

Furthermore, the current system for consumer protection is already costly for the economy and would benefit from reform. Today, when the U.S. Consumer Product Safety Commission determines that a product is defective and dangerous, it recalls the product.¹⁶¹ The Department of Health and Human Services, however, has found that a recall is not effective at protecting consumers.¹⁶² Furthermore, a recall is incredibly expensive for the retailer. The costs associated with a recall are so expensive, and the chance of a recall great enough, that companies are now seeking insurance to specifically cover these costs.¹⁶³ Increased liability on retailers would help alleviate the problems with the recall system: it would decrease the necessity to pay for a recall by encouraging safer products.¹⁶⁴ Fewer recalls would bring down the price of recall

160. John Gallagher, *Michigan Prepares for Next Financial Challenge: With Aid Approved, State Readies for a Cultural Shift*, DETROIT FREE PRESS, Dec. 22, 2008, at A1 ("The state has seen eight consecutive years of job loss and over the past year has led or been near the top among states in unemployment . . .").

161. U.S. Consumer Prod. Safety Comm'n, Frequently Asked Questions, <http://www.cpsc.gov/about/faq.html> (last visited May 14, 2009).

162. U.S. CONSUMER PROD. SAFETY COMM'N, RECALL EFFECTIVENESS RESEARCH: A REVIEW AND SUMMARY OF THE LITERATURE ON CONSUMER MOTIVATION AND BEHAVIOR (2003), (on file with the University of Michigan Journal of Law Reform) available at <http://www.cpsc.gov/LIBRARY/FOIA/FOIA03/os/RecallEffectiveness.pdf> (report prepared by XL Associates & Heiden Associates) (compiling the literature and presenting several problems which impede the effectiveness of product recalls, including how to communicate with the purchasers of defective products and how to motivate those purchasers to stop using the recalled product and/or return the product).

163. James M. Davis, *Risks Made in China: Manufacturers Love China Because the Chinese Make Products More Cheaply than Just About Anyone Else*, RISK & INSURANCE, Jan. 2008 (on file with the University of Michigan Journal of Law Reform), available at http://findarticles.com/p/articles/mi_m0BJK/is_1_19/ai_n24239640 ("[I]nsurance coverage [i]s the primary bulwark against losses caused by product recalls or third-party liability suits stemming from the sale or incorporation of faulty imported goods.").

164. This idea that retailer liability encourages better products is posited as an argument for retailers supplying all types of products, not just consumer goods. See, e.g., Kenneth E. Spahn, *Service Warranty Associations: Regulating Service Contracts as "Insurance" Under Florida's Chapter 634*, 25 STETSON L. REV. 597, 625 (1996) ("If, however, retailers are held ultimately responsible for the 'products' . . . they sell, they will demand greater assurance of future performance by their suppliers . . ."); Rachel B. Adler, Comment, *Device Dilemma: Should Hospitals be Strictly Liable for Retailing Defective Surgical Devices?*, 5 ALB. L.J. SCI. & TECH. 95, 129 (1994) ("[R]etailer liability on hospitals would give manufacturers an even greater inducement to produce safer products."); Laura Pleicones, Note, *Passing the Essence Test: Health Care Providers Escape Strict Liability for Medical Devices*, 50 S.C. L. REV. 463, 485 (1999) ("A retailer can simply refuse to buy a product that has not been thoroughly tested or that poses a known risk. In that sense, the retailer does have control over a product, even though it may not participate directly in its manufacture.").

insurance, thereby improving the economic position of American companies.

*D. Liability Will Deter the Production and Consumption
of Dangerous Products*

Deterrence is an essential reason to re-establish retailer liability. Richard Primus, a legal scholar, writes:

One of the chief functions of law is to influence behavior, and much of our understanding of law assumes that most people will seek to conform their conduct to what the law requires, whether from a sense of simple obligation or because the system of legal incentives and deterrents makes it instrumentally rational for them to do so.¹⁶⁵

Furthermore, the tort system, “by standing ready to impose financial consequences after the fact if an actor causes an unreasonable harm . . . operates to influence behavior before the harm ever occurs.”¹⁶⁶

The tort system works to deter in two different ways. First, it encourages manufacturers and producers to seek out safer products in order to reduce their costs in compensation by “creat[ing] the financial incentive for manufacturers to find more cost-effective ways to reduce or eliminate product risks.”¹⁶⁷ Second, it encourages consumers to pick out safer products by making safer products cheaper: when a retailer is “held strictly liable for the injuries their products cause, those enterprises will have to pay compensation to victims or higher insurance premiums, which they will then pass on to consumers in the form of increased prices for their products.”¹⁶⁸ The more dangerous the product, the higher the price required to reimburse the manufacturer and/or retailer for the compensation the manufacturer and/or retailer will subsequently have to pay out to injured victims. The “natural tendency of consumers” is to choose the safer, and cheaper, product.¹⁶⁹ As a result, retailers provide safer products and victims seek out safer products, thereby decreasing the risk of injury.

165. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1010 (2004).

166. Center for Progressive Reform, *supra* note 31.

167. Henderson, *supra* note 36, at 1579.

168. Williams, *supra* note 10, at 270–71.

169. *Id.* at 271.

Advocates for tort reform counter that "freedom-loving Americans should be entitled to make choices about the level of safety risk they are willing to accept" and "individuals must be allowed to assess what risks they are willing to assume, even if they are willing to accept more risk than the courts or legislature deems prudent."¹⁷⁰ This "assumption of risk" argument was first articulated by Justice Colin Blackburn in *Fletcher v. Rylands*.¹⁷¹ In that case, Justice Blackburn argued that where "circumstances were such as to show that the plaintiff had taken the risk upon himself" there should be no liability imposed on another.¹⁷² Since the consumer purchased the defective product and presumably decided not to insure himself or herself to cover the costs of an injury, tort reform advocates argue that he or she assumed the risk of injury and therefore should bear the cost.

This argument, however, fails to recognize that consumers often have no way of knowing whether a product is likely to be unsafe or defective. The average person cannot tell whether a toy train is decorated with a lead-based paint or whether pet food is tainted with poison. Consumers may intend to buy the safest product they can find, but without the knowledge and resources required to determine which product is actually safer, they are unable to assess the level of risk they are assuming by purchasing a certain product.¹⁷³

Generally speaking, the cost for a single consumer to investigate the risks of any given product, before purchase, would be astronomical. The consumer would have to either conduct a costly search for reliable information on the product or hire someone to do the investigatory work. It would be much cheaper to impose this cost on the retailer. Retailers are able to make such inquiries themselves, pay someone else to make them, or insist upon consumer protection by purchasing indemnity insurance as a cost of doing business.¹⁷⁴ When negotiating major contracts, retailers can establish baseline safety requirements and proof that those requirements are met.¹⁷⁵ If needed, they are also capable of staffing

170. La Fetra, *supra* note 20, at 645-46, 663; see also Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872, 873 (1982) (discussing the arguments for and against applying the assumption of risk doctrine to strict products liability).

171. *Fletcher v. Rylands*, 1 L.R. Exch. 265 (1866).

172. *Id.* at 286.

173. Calabresi, *supra* note 11, at 726 ("The first reason for the difference is that one of the two actors may, in practice, be far better able than the other to evaluate the accident risk, that is, the expected accident costs. And if this is the case, his activity is the more suitable one, in terms of deterrence of accident-prone activities, to bear the initial loss.").

174. Williams, *supra* note 10, at 270.

175. U.S. Consumer Prod. Safety Comm'n, *supra* note 12.

safety departments and making them responsible for ensuring and testing the safety of products they intend to sell.¹⁷⁶ The cost for this type of inquiry is prohibitive for the average consumer and furthermore, it would be extremely difficult for consumers to work together in order to share the assessment of risks.¹⁷⁷ A retailer, however, can spread these costs over all of the products he or his trade group sells.¹⁷⁸ To make this cost more manageable, a retailer could also collaborate on safety issues with other retailers or lobby the government to assume the burden of ensuring safety. Justice Richard Posner, a tort scholar who emphasizes the importance of cost-efficient tort liability, acknowledges that in a case where either party:

could have prevented the accident . . . [and] the cost of prevention to the injurer would have been lower than the cost of prevention to the victim[, t]he correct economizing rule . . . is to make the injurer liable, even though the victim may be said to have been contributorily negligent.”¹⁷⁹

This is an argument that has also been supported by Judge Guido Calabresi, a high-profile jurist and an expert in tort and economic policy, since the 1960s.¹⁸⁰

As Justice Traynor remarked in one of the fundamental cases on product liability, *Escola v. Coca-Cola Bottling Company*, “public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.”¹⁸¹ Since consumers are unable to respond to deterrence where they are unable to assess the risks, the liability must be placed on retailers and manufacturers who are able to respond to these deterrent incentives.¹⁸²

176. *Id.*

177. Calabresi, *supra* note 11, at 731 (“[T]here are many situations in which artificial bargaining is even theoretically impossible because one group of ‘bargainers’ cannot be organized without some degree of outside coercion.”).

178. Henderson, *supra* note 36, at 1577.

179. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 40 (1972).

180. *Id.* at 30 n.1.

181. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

182. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 180 (1970) (stating that deterrence does not work where costs are externalized “due to inadequate knowledge”); Calabresi, *supra* note 11, at 729 (“The best we can do, then, in a bargaining situation is to place the original cost on the party to the bargain whose actuarial class can best evaluate the risk of . . . costs in the future.”).

E. Litigation Helps Publicize Dangerous Products

The tort system has another often overlooked benefit: imposing liability on manufacturers and retailers encourages the dissemination of information regarding the product, and often publicizes the risk of a defective product before it would otherwise be noticed.¹⁸³ This supports the theory that retailers should be held liable, as well as manufacturers, because when a manufacturer cannot be reached, and retailer liability does not exist, the plaintiff may be unable to find a lawyer to take the case because there is little chance of recovery.¹⁸⁴ Consequently, the information about the defective product will likely become public later than it would have through beginning a public product liability action. In contrast, when a retailer can be held liable, the lawsuit will move forward, the lawyer for the plaintiff will hire experts in the field to present testimony at trial, and valuable information about defective products will be presented in a public forum. This second scenario not only helps the individual harmed, but also other consumers, who are then able to make more responsible choices about the products they purchase.

F. Duty And Morality Require Retailers to Compensate Victims

Finally, many argue that the retailer has assumed a duty toward the public by placing goods for sale:

[T]he public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon by the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the

183. David Partlett, *Of Law Reform Lions and the Limits of Tort Reform*, 27 SYDNEY L. REV. 417, 425–26 (2005) (“The strong remedial American torts system has produced considerable information about injuries and illnesses caused by toxic substances and defective products.”).

184. *Id.* at 427 (“Supercompensatory damages encourage attorneys, as bounty hunters, to root out harm-producing behavior, bringing malefactors to book.”).

proper persons to afford it are those who market the products.¹⁸⁵

In other words, the non-manufacturing seller owes a duty to the public. A retailer, just like the manufacturer, benefits from the sale of a product to the consumer. It seems both fair and just that such a benefit would also create a duty on the part of both the manufacturer and the retailer to ensure that the product being presented to the public is safe.

An empirical analysis of the public policy reasons behind the use of the strict liability doctrine shows that this sense of duty and fairness is an important factor in the opinions written by many judges.¹⁸⁶ Our innate sense of fairness requires us to hold retailers accountable.

V. CONCLUSION

Victims who are injured by a defective product deserve to receive compensation. Repealing or re-interpreting § 2947 will allow Michigan victims to recover from retailers more easily. As a result, when a defective imported product injures an individual, he or she will be able to seek relief directly from the retailer and, where possible, from the manufacturer. As discussed, this system will produce safer products for the majority of consumers, prevent the State from allocating scarce public resources to cover the victim's costs, level the playing field for Michigan manufacturers and allocate the risks of purchasing cheaper products to all those who benefit from them rather than allowing the occasional victim to bear the entire cost alone. This system is more economical, and more just, than Michigan's current law. The need for reform on this issue is urgent.

If Michigan decides to reinstate liability against retailers, the next question becomes how such liability will be enforced and what compensation victims will receive. Academics and policy pundits continue to debate the advantages and disadvantages of compensation: whether liability on retailers should be imposed only in cases where the manufacturer cannot be reached,¹⁸⁷ whether victims

185. Arnold, *supra* note 13, at 182 (quoting *O.S. Stapley Co. v. Miller*, 447 P.2d 248, 251-52 (Ariz. 1968)).

186. Henderson, *supra* note 36, at 1575.

187. Sachs, *supra* note 101, at 1035.

should receive economic and/or noneconomic damages,¹⁸⁸ and how much liability should be placed on which of the players.¹⁸⁹ The method for remedying victims is beyond the scope of this Note. This Note argues that non-manufacturing retailer liability, in some form, is essential. However, it does not attempt to argue *how* this liability should be imposed. There are many public policy factors that must be considered in determining how to allocate a victim's compensation, and therefore, the legislature is the appropriate place for these factors to be balanced and considered.

Tort reform appears to have a permanent place in modern political discourse. As discussed *infra* Part I, tort reform appeals to voters for many reasons. One academic who studies tort reform, Sandra Gavin, writes that the "rhetoric of the reform movement itself plays a major role in shaping public opinion and in thwarting further judicial expansion of [tort liability]."¹⁹⁰ She argues that the tort reform movement has used "assertive rhetoric" and fear to support its argument, rather than solid logic.¹⁹¹ She says:

Stealth tort reform operates to manipulate public perception about the state of the law without regard to truth or logic. It is not directed toward promoting social justice other than to 'change perceptions of what the common good ought to be.' Most importantly, stealth tort reform is not interested in truth; unlike common law, it persuades through assertive rhetoric and not through the give-and-take of orderly proof and argument, but through manipulation of images and ideas.¹⁹²

As a result, proponents of tort reform have created fears of increasing medical costs and the loss of business and engendered a perception of sneaky lawyers and lazy victims who are looking to make money off hard-working entrepreneurs.¹⁹³

Although Gavin does not intend to posit whether tort reform is actually advantageous, she questions whether this type of marketing is disadvantageous to the public.¹⁹⁴ It hides the real arguments and, as a result, the public could make poor choices without the

188. Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 164 (2004) (arguing generally that pain and suffering damages should not be awarded in tort claims, but also discussing the history of pain and suffering damages).

189. Sachs, *supra* note 101, at 1035.

190. Sandra F. Gavin, *Stealth Tort Reform*, 42 VAL. U. L. REV. 431, 432 (2008).

191. *Id.* at 441, 448.

192. *Id.* at 441.

193. *See id.* at 446–50.

194. *See id.* at 458–59.

benefit of understanding the reasoning behind the arguments.¹⁹⁵ The recent chain of events in Michigan lends credibility to Gavin's thesis. As discussed *infra* Part II.D, Michigan voters allowed the legislature and the judiciary to expand tort reform without regard to the consequences. As a result, Michigan victims have few means of compensation for injuries from Chinese-made defective products. This potential outcome was not discussed when Michigan's tort reform measures were enacted. Michigan's laws, when coupled with our globalizing economy, leave the state's citizens open to an increased risk of injury without a means of recovery.

Americans are unlikely to return to purchasing only American-made products in the near future. As a result, consumer-victims must be able to recover damages if they are the unfortunate victims of a dangerous or deadly defective product manufactured abroad. As Russell writes, "[t]he incentive of damages serves a much larger purpose than simply compensating the individual victims of negligence."¹⁹⁶ Liability is a "reflection of [a] goal or value that society seeks"¹⁹⁷ and allowing victims to sue the retailer in addition to the manufacturer furthers our societal goals. The result is the "most beneficial for the most people," and therefore adheres to "[o]ne of the most dominant goals of tort law . . . social utility."¹⁹⁸ It places the costs on the party who is best able remedy the situation. It deters retailers from selling defective products and encourages the retailer to be responsible in choosing safer products. It ultimately benefits all of society by producing fewer injuries, reducing medical costs, and increasing worker productivity by keeping would-be victims in the economy.¹⁹⁹

Russell writes that the "net result" of tort liability "may be greater costs for actors in the world but lower costs to society as a whole, by virtue of the costs saved in terms of the injuries and pain and suffering avoided by enhanced safety."²⁰⁰ Our justice system should strive for this goal and reinstating retailer product liability in Michigan will advance it. If for no other reason, we should allow recovery for the unfortunate few who must pay the cost of allowing the rest of us to benefit from the economic choice of choosing cheaper products. If Michigan reinstates non-manufacturing

195. See *id.*

196. Russell, *supra* note 133, at 1065.

197. Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 *RUTGERS L. REV.* 259, 286-87 (2008).

198. *Id.* at 289.

199. See *Economic Costs of Injuries*, *supra* note 37; *Economic Cost of Injuries to Children and Adolescents*, *supra* note 135.

200. Russell, *supra* note 133, at 1060.

retailer liability, not only will risk be carried by all of those who benefit from cheaper prices, but the price of goods will also rise to accurately reflect the full cost of the product, including potential injuries it might cause. Under the present interpretation of the law, those of us who are not injured benefit from cheap prices, while the few who are severely injured suffer greatly. A new interpretation of § 2947 will allow those who are injured to have, at the very least, the comfort of knowing that their injuries and damages will be compensated.